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No. 90-123

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1990

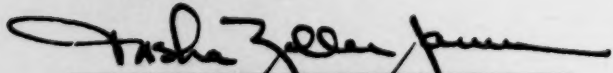
LISA REEVES WILSON and
RONALD SCOTT WILSON, - - - Petitioners,

VERSUS

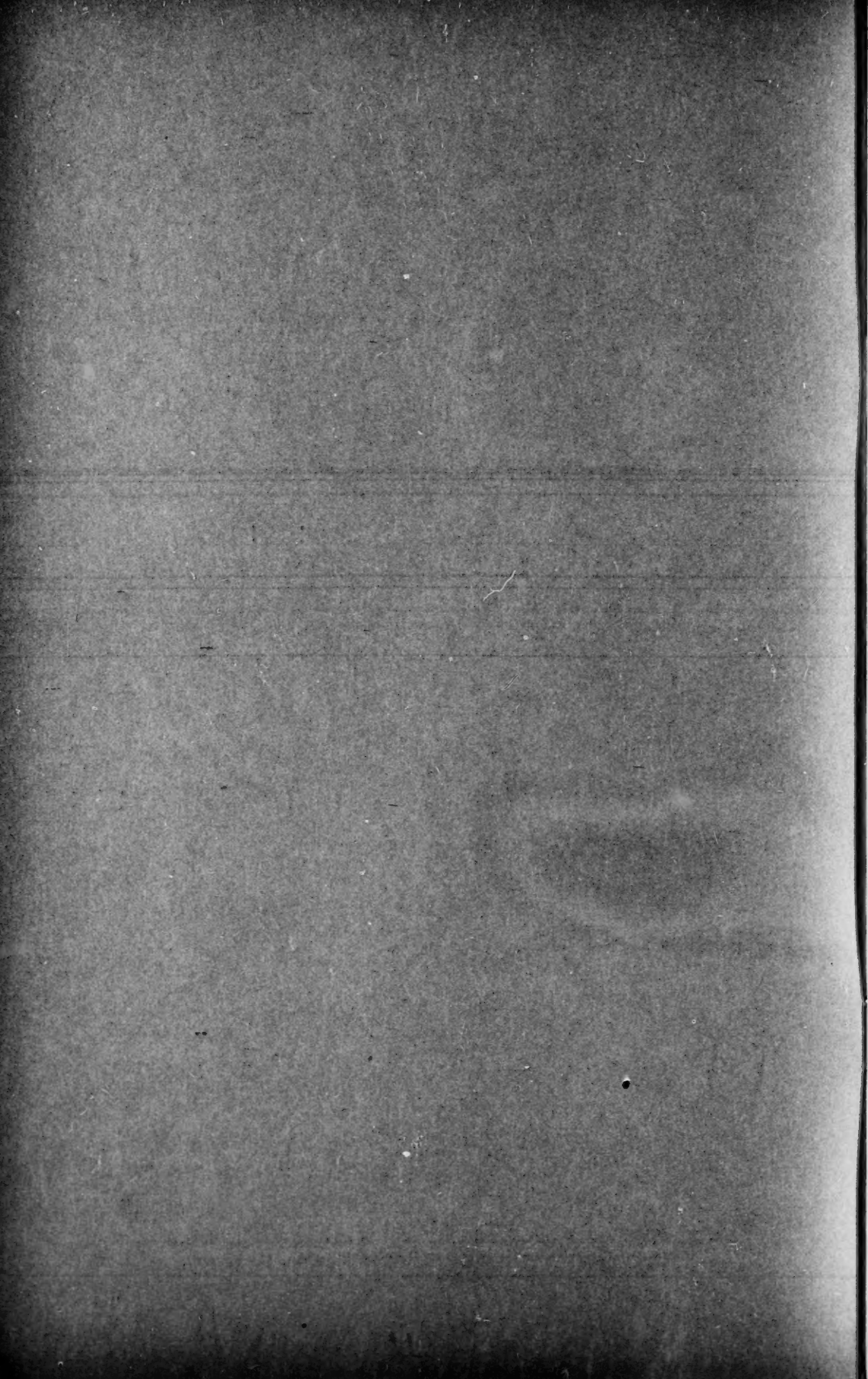
BROOKE DARROW, Et Al., - - - Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Did the state adoption process operate to deny equal protection to Petitioner, a white couple, in placing a biracial child with an interracial couple who had been approved for adoption and were on the adoption "Register" prior to the time of Petitioner's initial inquiry regarding adoption.

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LISA REEVES WILSON and

RONALD SCOTT WILSON, - - - - *Petitioners,*

v.

BROOKE DARROW, Et AL., - - - - *Respondents.*

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The Respondents respectfully request that this Court deny the Petition for Writ of Certiorari seeking review of the Opinion of the Kentucky Court of Appeals entered August 25, 1989. That Opinion is unreported.

COUNTERSTATEMENT OF THE CASE

Petitioners, Lisa Reeves Wilson and Ronald Scott Wilson, sued under 42 U.S.C. §1983 claiming that the Commonwealth of Kentucky, Cabinet for Human Resources, and certain named employees, discriminated against them because they are white, in not choosing their home for placement of a biracial child for the purpose of adoption. Petitioners are not members of a protected class. At trial the Cabinet showed that Kentucky has a fair and impartial policy and procedure for dealing with all adoptions and that that procedure was followed. (R: 116; Trial Transcript, hereinafter "TT", Vol. I, pp. 73-74, 104-110; Vol. II,

pp. 4-8, 40-47, 53-69, 81-2). The constitutionality of Kentucky's transracial adoption policy was never raised or made an issue.

Further, the Cabinet showed that the reason Lisa Reeves and Ron Wilson were not considered was because they were not on the approved adoptive list, the Register. (R: 116; TT, Vol. II, pp. 44, 57-8, 64; Vol. I, pp. 43, 81-2). Lisa Reeves was living with her mother, but stated she would be getting married in six months to Ron Wilson and they would have a home of their own. No home study could be done until this event occurred, and a satisfactory home study is an essential prerequisite to being placed on the Register. (R. 116; TT, Vol. I. pp. 61-62; Vol. II, Def. Ex. 2). The child was placed for adoption with an interracial couple who were on the Register before Petitioner Reeves made her request to adopt.

FACTUAL BACKGROUND

Respondent, D.H. (also referred to as Maria) is a female infant, born July 24, 1984. Respondent, Cabinet for Human Resources, took the child from the custody of her natural mother on August 1, 1984 and placed the child with foster parents, Hughie and Helen Kidd. Because of complications in locating the natural father, parental rights were not terminated until June 30, 1987. A decision was made at the child's 24-month conference to attempt to place the child for adoption at "legal risk." This term means, simply, that permanent placement is dependent on successful termination of the natural parents' parental rights. On December 18, 1986 the child was formally placed, at legal risk, in the home of prospective adoptive parents, John and Trudi Cavins. The Cavins had been on the waiting list, the Register, with the Cabinet for Human

Resources, as approved adoptive parents since July 31, 1985. (R: 116; TT, Vol. I, p. 107).

Prior to placement, during the child's stay at the Kidd's foster home, Petitioner, Lisa Reeves Wilson, then Lisa Reeves, voluntarily baby-sat for the child and, without the Cabinet's knowledge or authorization, kept the child for an undocumented, undeterminable number of nights at the home of her parents, John and Ethel Reeves, where Lisa resided up to the date of her marriage in February of 1987.

Petitioner, Lisa Wilson, testified that she had first expressed an interest in adopting D.H. (a/k/a Maria) in August of 1985 by placing a phone call to Edie Dye, the foster care social worker on the case. (R: 1; Complaint, para. 9).

Edie Dye told her that she needed to contact the adoption team and get on the adoption list. Miss Reeves contacted Ms. Naomi Murphy of the adoption team who told her that the first step in the adoption process was to attend preparation classes. Petitioner admitted that she was given no assurances that attendance at such classes would ensure placement of her name on the approved adoptive parent list or placement of the child, D.H., with her.

Lisa Reeves and her mother attended four classes held in March of 1986. [Ron Wilson did not attend those classes and, in fact, had no contact whatsoever with the Cabinet or any of its employees until the deposition of Brooke Darrow, May 21, 1987. (R: 116; TT, Vol. I, pp. 55-56)]. During the course of those meetings, Lisa Reeves was informed that, in order to become an approved adoptive parent and get on the waiting list, a home study had to be completed. She was further told, and understood, that there were two problems with completing a home study on her case: (1) the Cabinet does not do home studies on a couple asking

for a specific child because the Cabinet cannot and does not assure placement of a particular child with any one couple; and (2) the fact that Petitioner planned to marry within six months created a problem in completing a home study in that the "home" was going to change significantly with the marriage. Lisa Reeves had fully informed the Cabinet, without reservation, of her impending marriage to Ron Wilson, and, in turn, Petitioner admitted that she was fully informed by the Cabinet of the problems in approving a single person as an adoptive parent when the person plans a marriage within the immediate future.

It was because of the complexities of her single/soon-to-be -married status that a home study was never scheduled for Lisa Reeves. In fact, Lisa Reeves never requested that a home study be done for the purpose of getting her name on the approved adoptive list.

At the end of the March 1986 classes, upon learning of the complexities of the application process and the unique, inherent problems that her status presented in terms of approving her home immediately for placement of *any* adoptive child, Lisa Reeves chose to "appeal" what she perceived as a "decision" not to allow her to adopt Maria. In truth, no decision was made, there was merely a hard-to-swallow fact: a home study of her parents' or boyfriend's home was simply inappropriate at that time. In an attempt to get around this fact, Lisa called Respondent Brooke Darrow, a family services office supervisor.

Ms. Darrow met with Lisa and her mother, Ethel Reeves, April 9, 1986. In that meeting an additional consideration, unfavorable to Lisa Reeves' desire to adopt D.H., was raised, that being the consideration of race. Ms. Darrow explained to Miss Reeves and her mother that it was and

is the Cabinet's policy, all things being equal, to place a child in a family of his own racial background, and that, even if Petitioner were on the approved adoptive list, there were probably a number of interracial, as well as black, and white, families ahead of Petitioner. Ms. Darrow followed up that meeting with a letter, dated April 11, 1986, reiterating those points.

In her deposition, Petitioner testified that she left the meeting with Brooke Darrow feeling she didn't have a chance of adopting D.H., but that she wasn't discouraged and that she planned to go on with the adoption process anyway; however, this she did not do.

After the April 9th meeting with Ms. Darrow, Lisa Reeves had no contact with the Cabinet concerning the adoption process for 5½ months, until September of 1986 when she called Charla Lampson, an adoption team worker. Miss Reeves asked Ms. Lampson to meet her at the home of Ron Wilson. Ms. Lampson complied with such request. Upon arrival at that residence, Lisa Reeves explained that her September wedding had been postponed. Miss Reeves asked that Ms. Lampson go ahead and do a home study of Ron Wilson's home for purposes of adopting D.H. Miss Reeves did not live in Ron Wilson's home at that time. Charla Lampson again explained the problems (1) with doing a home study on Ron Wilson's home for the purpose of approving Lisa as an adoptive parent when Lisa did not live there, and (2) with doing a home study on Lisa while she was planning a marriage. Miss Reeves testified that she understood these complexities.

In December of 1986 Lisa Reeves filed a service complaint with the Cabinet for Human Resources against Edie Dye. That complaint was dropped before a hearing. An

in-house investigation of the matter revealed no wrongdoing on the part of the Cabinet or any of its employees.

Lisa Reeves and Ron Wilson were married in February, 1987, and in April, 1987, this suit was filed.

A two day trial was conducted in February, 1988. The jury found unanimously in favor of the Respondents. The Kentucky Court of Appeals affirmed August 24, 1989. The Supreme Court of Kentucky denied discretionary review April 18, 1990.

REASONS FOR DENYING THE WRIT

Petitioners do not present a legitimate constitutional claim. They do not claim that the Kentucky adoption process is unconstitutional or even that it is unfair to the many applicants who adopt children. Petitioners contend they should not be required to go through the same process as everyone else. They have never qualified to be placed on the Register, yet they want to be considered ahead of parents who had been on the approved Register for nearly two years. Petitioners demand a preference and phrase the denial of one as discrimination. (R: 116; Vol. I, pp. 40-51).

In denying Petitioners' so-called equal protection claim, the Kentucky Court of Appeals properly applied the principles governing transracial adoptions as set forth in *Drummond v. Fulton County Department of Family and Children's Services*, 563 F. 2d 1200 (5th Cir., 1977) cert. denied 437 U.S. 910, 57 L. Ed. 2d 1411, 98 S. Ct. 3103 (1978). There is no conflict between the *Drummond* decision and those of the Supreme Court or other Circuits. There is no basis for a claim of denial of Equal Protection.

I.

The Kentucky Court of Appeals Correctly Applied *Drummond v. Fulton County Department of Family and Children's Services* Which Recognized That the Difficulties Inherent in Interracial Adoption Justify the Consideration of Race as a Relevant Factor in Adoption.

Under Kentucky law when a child is committed to the Cabinet for Human Resources, the Cabinet alone has the authority to place the child for adoption. KRS 199.470(4) The Cabinet cannot be forced to approve an adoption unless the withholding of such approval is found to be arbitrary and capricious. *Commonwealth v. Jarboe*, Ky., 464 S.W. 2d 287 (1971), citing *Lewis v. Louisville and Jefferson County Childrens Home*, Ky., 218 S.W. 2d 683 (1949).

KRS 199.472 reads as follows:

(1) The department shall establish criteria to be followed for the adoption of children and promulgate this criteria by administrative regulations.

(2) The department shall file the regulations as provided for in KRS Chapter 13A with the legislative research commission.

Pursuant to KRS 199.472 the Cabinet for Human Resources has promulgated administrative regulations to be followed in the selection and aproval of adoptive parents. See: 905 KAR Chapter 1; specifically 905 KAR 1.030. (App. 1a). The Cabinet has further adopted the Department for Social Services' Policy and Procedure Manual for the purpose of implementing and enforcing, inter alia, the adoption provisions set forth in KRS 199.470 et seq. 905 KAR 1:180 § 1. (App. 2a).

The DSS Manual sets forth the Cabinet's Transracial Adoption Policy as follows:

All things being equal it is preferable to place a child in a family of his own racial background. However, no child available for adoption should be deprived of ~~the~~ opportunity to have a permanent family of his own because of his age, religion, race, nationality, residence, or handicaps that do not preclude his living in a family or community. Because of this racial background in itself should not determine the selection of a family for a child. Transracial adoption is a valid method of providing a child with a home and family that will meet his needs. (R: 116; TT, Vol. II, Def. Ex. 6).

The gravamen of this action lies in Petitioners' assertion that their alleged constitutional rights were violated under 42 U.S.C. 1983 and that Respondent relied on constitutionality impermissible factors in placing the infant child, D.H., for adoption.

The issue of whether or not consideration of race is constitutionally permissible in placing a child for adoption has been decisively addressed by the federal courts. *Drummond, supra. Drummond*, clearly the lead case in this area of law, is four-square with the case at bar. In *Drummond* the Fifth Circuit affirmed dismissal of an action brought to challenge the refusal of a county adoption agency to allow a white couple, who had acted as the state designated foster parents for over two years, to adopt a biracial child.¹ Dismissal was granted despite claims that the adoption agency's denial of the application was based solely on racial grounds and violated the couple's right to equal protection and due process under the United States Constitution.

¹In the case at bar Lisa Reeves and Ron Wilson were not even married during the period they claim to have cared for the infant, D.H., let alone were they an approved foster family with sanctioned custody of the child. (R: 116; TT, Vol. I, pp. 39-40).

The *Drummond* court specifically responded to the following query: “[C]an race be taken into account, perhaps decisively, if it is the factor which tips the balance between two potential families, where it is not used automatically?” Citing *Compos v. McKeithen*, 341 F. Supp. 264, 266 (E.D. La. 1972), the court

. . . concluded, as did another court which grappled with the problem, that “the difficulties inherent in interracial adoption” justify the consideration of “race as a relevant factor in adoption . . .” *Drummond*, at 1205.

The couple’s claim of a liberty and property interest based upon the fact that during the period the child lived with the couple mutual feelings of love and dependence developed, was rejected by the *Drummond* court.

Drummond has been consistently upheld by the federal courts. *Kyees v. County Department of Public Welfare of Tippecanoe County*, 600 F. 2d 693 (7th Cir. 1979); *Sherrard v. Owens*, 644 F. 2d 542 (6th Cir. 1981); *Crim v. Harrison*, 552 F. Supp. 37 (N.D. Miss. 1982); *Backlund v. Barnhart*, 778 F. 2d 1386 (9th Cir. 1985); *Gibson v. Merced County Department of Human Resources*, 799 F. 2d 582 (9th Cir. 1986).

None of the cases cited by the Petitioner address the issue of racial consideration with regard to adoption. *Palmore v. Sidoti*, 466 U.S. 429, 104 S. Ct. 1879, 80 L. Ed. 2d 421 (1984) and *Holt v. Chenault*, Ky., 722 S.W. 2d 897 (1987), while colorably close, are easily distinguished in that they both involved an attempt by the natural father to remove his child from the custody of the natural mother because of her remarriage to a person of different race.

The kernel of Petitioners’ prayer for relief, when the chaff is blown away, is that they should be given a prefer-

ence over the seventy-two people/couples on the approved adoptive waiting list because they spent a great deal of time with the child while she was in foster care. (R: 116; TT, Vol. I, p. 47). However, the Kentucky Supreme Court has held:

We quake at the thought of the additional burden upon overloaded courts if they were required to engage in qualitative comparisons in instances where one home has already been approved before another even applies. *Department for Human Resources v. R.G. and J.G. and S.H.*, Ky., 664 S.W. 2d 519, 522 (1984).

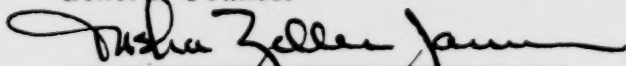
The prospective adoptive home in which the child was placed was *approved* July 31, 1985 (R: 116; TT, Vol. I, p. 107); Lisa Reeves *did not even inquire* about adoption until August 1985: (R: 1: Petitioners' Complaint, para. 9).

CONCLUSION

For the reasons stated above, Respondents pray that this Court deny the petition for writ of certiorari.

Respectfully submitted,

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APPENDIX



905 KAR 1:030. Selection and approval of adoptive parents

RELATES To: KRS 199.471, 199.472

STATUTORY AUTHORITY: KRS 194.050, 199.472

NECESSITY AND FUNCTION: This regulation is necessitated by the mandate found in KRS 199.472. It functions to establish guidelines for the placement of children for adoption by the Cabinet for Human Resources.

Section 1. The rights and best interests of children to be adopted shall be paramount. Placement of children shall be based upon the needs of individual children available for adoption and the ability of the adoptive applicants to meet these needs.

Section 2. The approval of applicants for adoption shall not guarantee the placement of any child with them.

Section 3. In order to be approved, applicants shall make themselves available to representatives of the Cabinet for Human Resources for the purpose of evaluating their abilities to meet the needs of children available for adoption.

Section 4. Applicants shall be subject to departmental visitation, supervision, and evaluation of the child in the applicant's home after the child has been placed.

Section 5. Placement of a particular child with an applicant shall require prior approval by the Cabinet for Human Resources.

Section 6. The Cabinet for Human Resources shall consider placement of a child with an adoptive applicant of appropriate and responsible age, sufficient physical and mental health, adequate financial resources and housing facilities to provide a stable environment that meets the child's needs. The home shall provide an environment that is conducive to the child's well-being.

Section 7. No applicant shall be approved, and no child shall be placed with an applicant, if it is determined

that the applicant has opinions or feelings, as evidenced by statement or action, which might be expected to adversely affect the applicant's capacity for adoptive parenting. Such feelings or opinions include, but are not limited to, those concerning infertility, illegitimacy, heredity, race, physical characteristics or resemblances.

Section 8. In order to be approved, an applicant shall have a love for children and shall have a desire and capacity for parenting. They shall have a capacity for feeling satisfaction from contributing to the development of a child, and shall have an ability to deal with developmental differences and a sensitivity to, understanding of, and tolerance for children's differences. They shall be flexible about their expectations and be capable of accepting a child as the child is or may develop.

Section 9. The approved applicants shall be able to present the adoptive child with appropriate opportunities for religious, spiritual, or ethical development.

Section 10. Applicants with natural or adopted children shall be given the same consideration as childless applicants.

Section 11. No applicant for adoption and no child suitable for adoptive placement shall be denied approval or placement solely on the basis of age, race, sex, marital status, religion, or national origin.

Section 12. Brothers and sisters shall not be separated from one another unless the Cabinet for Human Resources shows conclusively that the separation will benefit the child. (DCW 7-8; 1 Ky. R. 294; eff. 1-8-75.)

905 KAR 1:180. DSS policy and procedures manual.

RELATES TO: KRS 194.060, 199.420 to 199.990, 200.080 to 200.120, 205.201 to 205.204, 205.455 to 205.465, Chapters 208, 209, and 600 to 645

STATUTORY AUTHORITY: KRS 194.050, 199.420, 200.080, 209.030, 605.150, 615.050, 620.180, 625.120, 630.140, 635.100, 640.120, 645.250

NECESSITY AND FUNCTION: P.L. 97-35, "Block Grants for Social Services—Title XX," authorizes grants to states for social services. KRS 194.050 authorizes the Cabinet for Human Resources to adopt such rules and regulations as are necessary to implement programs mandated by federal law, or to qualify for receipt of federal funds and as are necessary to cooperate with federal agencies for the proper administration of the cabinet and its programs. The function of this manual is to implement a statewide social services program.

Section 1. DSS Policies and Procedures Manual. For the purpose of implementing and enforcing those sections of the Kentucky Revised Statutes relating to social service programs for children and adults that apply to the Department for Social Services, the Secretary of the Cabinet for Human Resources hereby adopts, by reference, the Department for Social Services' Policy and Procedure Manual as revised through January 1, 1988, as the current policies and procedures of that department. The manual contains policies and procedures relating to management procedures, adult services, support services, family and children's services, and youth services. The Department for Social Services' Policy and Procedure Manual may be reviewed in any departmental field office located in each of the 120 counties or at the Office of the Commissioner, Department for Social Services, 275 East Main Street, Frankfort, Kentucky, during regular working hours.

Section 2. Summary of Amendment. In Chapter IV, Family and Children's Services, delete in their entirety Section A, Child Protective Services, and Section B, Commitment and Termination, dated 7/87, and substitute in

lieu thereof the revised Section A, Child Protective Services, and Section B, Commitment and Termination, dated 1/88. These revised sections clarify a variety of procedures including the procedures for child abuse/neglect reporting, interviewing children, and medical consent for children under temporary or emergency custody of the Department for Social Services. (11 Ky. R. 116; eff. 8-7-84; Am. 305; eff. 9-11-84; 504; eff. 10-9-84; 12 Ky. R. 290; eff. 9-10-85; 1552; eff. 4-17-86; 1689; eff. 5-6-86; 1950; eff. 7-2-86; 13 Ky. R. 374; 662; eff. 10-2-86; 1168; eff. 1-13-87; 1957; 6-9-87; 14 Ky. R. 1167; eff. 1-4-88; 1878; eff. 4-14-88.)

